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No. 289

Supreme Court of the United States

(OCTOBER TERM, 1951)

HARRY S. CONNELLY and MARION E. CONNELLY, W. A. GRANT and ELAINE GRANT, a copartnership doing business as Harbar Drilling Company,
Petitioners,

VERSUS

IRENE ETHEL JENNINGS,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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AUGUST, 1952.

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HARRY S. CONNELLY and MARION E. CONNELLY, W. A. GRANT and ELAINE GRANT, a copartnership doing business as Harbar Drilling Company,
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VERSUS

IRENE ETHEL JENNINGS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Come now Harry S. Connelly and Marion E. Connelly, W. A. Grant and Elaine Grant, a copartnership doing business as Harbar Drilling Company, petitioners herein, and most respectfully pray this Honorable Court that a writ of certiorari be issued to review a final decision and decree of the Supreme Court of the State of Oklahoma, the highest court of that state, rendered in a certain case pending in said Supreme Court Numbered 34518 and styled Harry S. Connelly and Marion E. Connelly, W. A. Grant and Elaine Grant, a copartnership doing business as Harbar Drilling Company, plaintiffs in error, now petitioners herein, against Irene Ethel Jennings, defendant in error, now respondent

herein, by which final judgment the said Supreme Court of Oklahoma affirmed a judgment of the District Court of Oklahoma County, Oklahoma, rendered against these petitioners and in favor of said respondent for the sum of $50,000.00 for damages for alleged wrongful death of respondent's husband, and in which final judgment the said Supreme Court denied petitioners the right to remove said cause to the United States District Court for the Western District of the State of Oklahoma.

SUMMARY AND STATEMENT OF MATTERS INVOLVED

The case herein involves the right of these petitioners under Title 28 U. S. Judicial Code 1948, Sections 1441 and 1446, as amended May 24, 1949, to remove said cause to the United States District Court for the Western District of the State of Oklahoma, when it first became removable during the trial of the cause on the merits.

There is further involved the point that upon the filing of a petition for removal under the Removal Act as amended May 24, 1949, and compliance with the procedural steps therein prescribed, the state court is divested of any jurisdiction to proceed further; that any proceedings in the state court are void unless and until a certified copy of order of remand be filed in that court. Prior to the enactment of 28 U. S. C. A. Par. 1446, as amended May 24, 1949, 63 Stat. 101, removability was not accomplished unless the case should thereafter be determined removable; hence state court proceedings after petition for removal were voidable only.

Respondent's husband, Alfred Jennings, an Oklahoma resident, was employed by petitioners as a derrick man on a drilling rig operated in Oklahoma. About six o'clock the afternoon of July 25, 1948, while on the derrick floor, Jennings started toward a nine-step stairway descending to the ground, apparently on his way to a shale shaker some forty-five feet from the derrick. A few minutes later, he was found unconscious on the ground near the stairway, his mouth swollen and bloody. He died on the way to the hospital. No one saw him fall from any point and none observed what caused his death.

Respondent brought suit against these petitioners, at all times non-residents of Oklahoma, joining as defendant, Charles Prather, an Oklahoma citizen, alleged to be field agent of petitioners, charging failure to furnish a safe place for her husband to work, by reason of which he fell to his death. The nine acts of negligence listed included alleged defects in the stairway and derrick surroundings.

Petitioners promptly filed their first petition for removal to the federal court (R. 29) claiming separable and independent cause of action and diversity of citizenship. In sustaining respondent's motion to remand (R. 37), Judge Broaddus found in part (R. 18-19):

> "The petition alleges two specific acts of active negligence as against Prather, which, if established by the evidence, would subject him to liability as a joint tortfeasor. These allegations are controlling in determining the question of jurisdiction on a motion to remand on all facts stated in the petition *in the absence of proof of fraudulent* joinder." (Italics ours).

Upon trial on the merits in the state court June 20-21, 1949, after the May 24, 1949, amendment to the Removal Act became effective, respondent abandoned the alleged acts of negligence against Prather and confined her evidence to three conditions of the stairway alleged to be defects, to-wit: that the stairway had no handrail on the left side descending, the distance between derrick floor and top of the first step was of greater distance than between the other steps; that the runner along the left side descending failed to come up flush with the derrick. Her witnesses affirmatively disclosed these conditions were not under Prather's control and that he had no duty concerning them. At the close of respondent's evidence in chief, the trial court sustained Prather's demurrer to the evidence against him (R. 217-219).

Immediately these petitioners moved the state court for a reasonable time in which to file their second petition for removal to the federal court, as authorized by the May 24, 1949, amendment, on the theory that Prather's joinder was fraudulent; that diversity of citizenship had always existed but had just then become ascertained (R. 219-221). The motion reads in part:

> "* * * the named applicants (these petitioners), now move the Court since they are foreign citizens of Oklahoma, a reasonable length of time to file their petition in the United States District Court for the Western District of Oklahoma, seeking that this case now be removed to the Federal District Court on diversity of citizenship of the defendants.
>
> "And on the motion the defendants represent to this Court that under the United States statutes, relating to removal, a petition is required to be filed in

the United States District Court; and the petitioners now have that petition ready and the petitioners are prepared to file it, and, if these proceedings are stayed, they will file said petition in the United States District Court, and again remove this cause to the United States Court for the reason and on the grounds heretofore stated."

The court overruled this motion, allowing exceptions (R. 221). At the close of all the evidence, petitioners renewed this motion which was again denied, exception allowed (R. 240).

While respondent took exception to the court's order sustaining Prather's demurrer, she filed no motion for new trial as required by the laws of Oklahoma, so that judgment became final.

Your petitioners urged in the trial court, the state supreme court and now urge, that the utter absence of any evidence against Prather shows that from the commencement of her action, respondent knew she had no semblance of a cause of action against him and the facts alleged with respect to him, were so clearly without foundation as to demonstrate no factual basis existed for an honest belief on her part that she had a cause of action against him; that the joinder of Prather was in law a fraudulent device to prevent removal. Hence a diversity of citizenship in fact existed from the filing of the action, despite the apparent cause of action stated in her petition.

Respondent presented as her own witnesses in chief, the crew members working with Jennings, including her

own brother, Andrew Cummings. She asked only three witnesses any questions concerning Prather. Kirkpatrick, driller, said the first man over him was the tool pusher (R. 101, 102); that Prather had been there several times during the month the crew had used the stairway (R. 102) but had never given any directions to add another handrail or to change or alter the stair (R. 103); that he himself did not have to have orders to do whatever was necessary to be done in and around the drilling of the well, as that was his own business (R. 105).

Respondent's brother who would be most interested in her behalf, said (R. 132) that the tool pusher was the one "in the company who had authority"; that Prather was out there sometimes when they were rigging up before the drilling started; that when any big job was to be done orders were given to the driller and the driller would tell the roughneck what to do (R. 133).

The third crew member, Hays, motorman on the derrick (R. 143) said Prather had been present on the location some but he did not know whether Prather used the stairway; that he did not hear Prather give any orders with reference to the stairway (R. 141). On cross-examination he admitted he did not know when Prather was last on the location (R. 145) but did not see him there the day of the accident, he knew (R. 146).

None of these witnesses were asked the duties of Prather and no other witness was queried concerning Prather.

Petitioners contended at the trial and ever since, that respondent at all times had access to these witnesses and

at all times had notice that Prather had no duties for the conditions relied upon.

Petitioners filed their motion for new trial June 24, 1949, within the three days provided by Oklahoma statute (R. 294) including therein the error of the court denying them time to file petition for removal. After this motion was overruled, they perfected appeal to the state supreme court.

On June 27, 1949, within six days after trial while their motion for new trial was pending, petitioners filed in the federal court, a second petition for removal (R. 16) reciting the proceedings on the first petition for removal, the action of the trial court in sustaining Prather's demurrer, the fact that respondent failed to present evidence against Prather and failed to file motion for new trial against him, and that by reason of her voluntary acts, and the false joinder the cause had become removable and a diversity of citizenship had always existed; and petitioners referred to the court's refusal to grant recess or time to file their petition before verdict. Petitioners furnished proper bond, and filed in the state court on June 27, 1949, the certificate of the court clerk showing receipt of certified copy of the petition for removal, and fully complied with the federal statutes (R. 16). Respondent failed to file any motion to remand and no order to remand appears in the files or record.

By reason of the trial court's denial of time to file removal proceedings and the resulting verdict, petitioners were compelled to continue their defense against the verdict and judgment entered over their objections, to appeal to the Supreme Court of the state.

Among the errors assigned both in their motion for new trial in the trial court and their assignments of error on appeal in the Oklahoma Supreme Court, petitioners specifically included the overruling of their motions for time in which to file their petition for removal and the denial of their right to remove.

On pages 87 to 96 of their original brief as plaintiffs in error on appeal to the state court, petitioners set forth their argument and authorities in support of their proposition that the joinder of Prather was fraudulent in law and therefore diversity of citizenship existed from the commencement of the action as well as the proposition that the May 24, 1949, amendment to Section 1446 (b) modified prior laws in that it granted defendants in the state court, the right to remove at any stage of the proceedings when removability first became ascertained.

Under date of February 12, 1952, the Oklahoma Supreme Court rendered opinion affirming the trial court judgment, holding with reference to the May 24, 1949, amendment:

> "We do not think this change was intended to affect a case that was in the process of being tried, but only applied to matters arising prior to trial."

This opinion is reported in Vol. 23, No. 6 of THE JOURNAL, published by Oklahoma Bar Association, dated February 16, 1952.

Within the time allowed by the rules of the Court, petitioners filed their petition for rehearing with brief in support thereof, in which they again presented the issues of removability.

The court denied this petition for rehearing under date of March 25, 1952, and on March 29, 1952, within five days allowed by the court's rules, petitioners filed their application for leave to file second petition for rehearing again renewing the proposition that Prather's joinder was fraudulent in law; that the May 24, 1949, amendment expressly granted the right of removal at any stage of the proceedings, removability became ascertained; and further that under this amendment, the filing of the second petition in the federal court together with compliance with the procedural steps required, actually effected removal in law, divested the state court of jurisdiction to proceed further; rendered void all subsequent proceedings of the state court because no order to remand was ever filed in the state court.

While the court has not acted on the application it did under date of July 29, 1952, direct respondent to file answer brief within ten days but she obtained extension until October 4, 1952, therefor.

Your petitioners say that heretofore in case of *Gypsy Oil Co.* v. *Esco,* 72 L. Ed. 393, 275 U. S. 498, 48 S. Ct. 112, this Court held that if the Oklahoma Court denies the *application* to file second petition for rehearing, instead of the second petition itself, then the court has not considered the second petition, so that the date of final judgment of the State Supreme Court would be the date when the first petition for rehearing was denied on March 25, 1952, whereas if the application be granted and the second petition be later denied, then the date of final judgment would be date of denying second petition.

Before the expiration of ninety days after March 25, 1952, petitioners obtained in this Court an extension of sixty days in which to file their petition for *writ of certiorari* in the expectation that the state court would within that sixty days make some kind of order on their application. The court has now granted respondent until October 4th in which to file answer brief. The extension granted in this Court expires August 22, 1952, and no further extension is authorized by the Statute.

Your petitioners say that if the Supreme Court of the State of Oklahoma should hereafter enter an order denying the *application* to file second petition instead of denying or granting the second petition, then and in that event the judgment of the State Supreme Court became final last March 25, 1952, and in such event if your petitioners fail to lodge this petition for *certiorari* on or before August 22nd, they will have lost their rights to petition this Court.

Your petitioners therefore say at this time and for the purposes of this petition, the judgment of the state court became final March 25, 1952, and will remain so until the State Supreme Court either grants or denies the second petition for rehearing. Your petitioners have presented their briefs and authorities in good faith and believe the rehearing ought to be granted by reason of the federal questions presented and also other errors appearing at the trial but until the Supreme Court of the state sees fit to reach a conclusion on the application or the second petition for rehearing, your petitioners feel impelled to preserve their right to seek review on the federal questions in this Court.

JURISDICTION OF THIS COURT

(1)

We submit that jurisdiction of this Court arises under Title 28 U. S. C. A. Section 1257 which provides in part:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows * * *.
>
> "(3) By *writ of certiorari* * * * where any title, right or privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held, or authority exercised under the United States."

(2)

The following cases are believed to sustain the jurisdiction of this Court:

Williams v. *First National Bank*, 216 U. S. 582, 30 S. Ct. 441, 54 L. Ed. 626, wherein this Court held, when jurisdiction was challenged by motion to dismiss:

> "Irrespective of other conditions, beyond peradventure a question of a federal nature was raised by the contention denied by the state court, that a right or privilege existed under a statute of the United States to remove a cause into the Circuit Court of the United States and a motion to dismiss cannot therefore prevail."

While the *Williams* case reached this Court by writ of error, yet in *Fullerton Kineger Lumber Co.* v. *Northern Pacific Railway Co.*, 266 U. S. 435, 45 S. Ct. 143, 69 L. Ed. 367,

this Court holds that *certiorari* is the proper manner now to review a judgment in a suit in which a right under an Act of Congress is claimed and denied. See also, *Metropolitan Casualty Co.* v. *Stevens,* 312 U. S. 563-69, 85 L. Ed. 1044, on right to present removability to this Court after saving exceptions to state court's denial of that right.

(3)

The Supreme Court of Oklahoma is the highest court of the state.

(4)

The judgment of which review is sought is a final judgment of the Supreme Court of Oklahoma.

(5)

As set forth above the judgment sought herein to be reviewed became final on March 25, 1952.

(6)

The federal questions of substance which petitioners claimed in, and which were denied by the state court, are:

(a) Under Title 28, Sections 1441 and 1446, as amended May 24, 1949, petitioners had a right to remove the cause to the federal court when removability was first ascertained even though that occurred during process of trial on the merits. Diversity of citizenship existed from the commencement of the action but Prather's fraudulent joinder was not disclosed until close of the evidence. Further respondent voluntarily abandoned her prosecution of her alleged cause of action against Prather during trial, finally ascertained after close of the evidence.

(b) Under Title 28, Judicial Code, Sections 1441 and 1446, as amended May 24, 1949, the United States District Court for the Western District of the State of Oklahoma—not the state court—was the only forum having jurisdiction to determine the removability of the action. Denial of time to file petition for removal deprived petitioners of their property without due process of law in violation of the Fifth Amendment to the Constituion of the United States, and the aforesaid statutes.

(c) The filing of petition for removal on June 27, 1949, and compliance with the removal statute, Section 1446, Title 28, U. S. C. A., as amended, transferred exclusive jurisdiction of the cause to the federal court, even though the cause should later be determined by that court non-removable. Such jurisdiction continued exclusive unless and until order of remand be issued by the federal court as required by Title 28, Section 1447 (c). No order of remand issued or was sent to or received by the state court.

We therefore submit that the decision and final judgment of the State Supreme Court of Oklahoma is squarely in conflict with the decisions of this Court construing the right of removal as well as with decisions of lower federal courts construing the right of removal under the May 24, 1949, amendment which have not yet reached this court; and is contrary to the express provisions of the removal act as amended and the intent of Congress.

(7)

The federal questions were timely raised, presented to and considered by the trial court and Supreme Court of Oklahoma. Petitioners raised them as follows:

a. in first motion to remove

b. demurrer to the evidence

c. motion for judgment at close of all the evidence

d. motion for new trial in trial court

e. assignments of error in Supreme Court of Oklahoma

f. briefs filed in Supreme Court

g. first petition for rehearing and briefs in support thereof

h. application for leave to file second petition for rehearing and second petition for rehearing and briefs in support thereof.

The trial court passed upon the federal questions and the Supreme Court of the State, in affirming the trial court and denying the first petition for rehearing, likewise passed upon the petitioners' claimed constitutional rights and rights under federal law.

THE QUESTIONS PRESENTED

The following questions are hereby presented for review:

1st. The May 24, 1949, amendment to Section 1446, Title 28, U. S. C. A. (c. 139, 63 Stat. 101), changed existing laws on removal to allow defendants to remove a cause within twenty days after it may first be ascertained that the case has become removable, even though the discovery be made in process of trial.

2nd. According to the evidence adduced by respondent at time of trial, she knew from the commencement of the action, or with reasonable diligence could have discovered, that she had no cause of action against Prather; her joinder of him as a resident defendant was a sham, without any reasonable basis in fact and without any purpose to prosecute the cause in good faith. Therefore diversity of citizenship existed from the commencement of the action as between these petitioners and respondent, but this fact was first ascertained during the trial on the merits, and at the close of respondent's evidence, at which time petitioners became entitled to remove the cause to the federal court again.

3rd. Respondent voluntarily abandoned her cause against the resident defendant Prather by not only failing to present any evidence tending to show Prather's responsibility for or connection with the alleged acts of negligence relied upon, but by adducing affirmatively through her own witnesses that the tool pushers, drillers and crew were responsible for the conditions of the stairway complained of; that Prather bore no duty towards the stairway. Whereupon the cause was then, during trial, ascertained to be removable, on account of diversity of citizenship.

4th. Under Title 28, Judicial Code, Sections 1441 and 1446 as amended May 24, 1949, the United States District Court for the Western District of Oklahoma was then the only forum having jurisdiction to determine the removability of the action. When the trial court usurped the power of the federal court in this regard and denied peti-

tioners their right to promptly apply for such removal in the proper forum, the trial court deprived the petitioners of a valuable and substantial property right without due process of law.

5th. By refusing petitioners time in which to file their petition for removal, the trial court and the Supreme Court through its affirmance on appeal, have deprived the petitioners of a substantial property right and of their property without due process of law, contrary to the Fifth Amendment to the Constitution of the United States.

6th. Prior to the adoption of Sections 1441 and 1446, U. S. C. A., Title 28, as mended May 24, 1949, either or both the state or federal court could continue proceedings in the case and parties reserved their proper exceptions. Section 1446 (e) as amended May 24, 1949, expressly provides that the filing of petition and bond as therein prescribed, "shall effect the removal and the state court shall proceed no further unless and until the case is remanded."

Section 1447 (c) prescribes the method of re-investing the court with jurisdiction. Thereunder the state court may proceed with the case when an order of remand has been mailed to its clerk. No such order of remand appears in this record and your petitioners therefore say that the rendition of judgment in the trial court, and the affirmance of that judgment in the Supreme Court are beyond the jurisdiction of the state court and contrary to and in violation of the foregoing U. S. statutes, hence void.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The Supreme Court of the State of Oklahoma has decided an important question arising under the Acts of Congress, to-wit: Sections 1441, 1446 and 1447 of Title 28, U. S. C. A. as amended May 24, 1949, in a way probably untenable and in conflict with the applicable decisions of this Court, the decisions of other federal courts on points which have not yet reached this Court, and contrary to the intent of Congress and in contravention to the Fifth Amendment to the United States Constitution. Among the decisions above referred to are:

—*Chesapeak & Ohio Ry. Co.* v. *Cockrell,* 232 U. S. 146, 35 S. Ct. 278, 58 L. Ed. 544;

Wecker v. *National Enameling & S. Co.,* 204 U. S. 176, 51 L. Ed. 430;

Updike v. *West,* 172 Fed. (2d) 663;

Polito v. *Molasky* (C. C. A.), 123 Fed. (2d) 258;

Wilson v. *Republic Iron & Steel Co.,* 257 U. S. 92, 42 S. Ct. 35, 66 L. Ed. 144;

Powers v. *Chesapeake,* 169 U. S. 92, 42 L. Ed. 673;

Clancy v. *Brown,* 71 Fed. (2d) 110;

Clark v. *Chicago, R. I. & P. Ry. Co.,* 194 Fed. 905;

Waldron v. *Skelly Oil Co.,* 101 Fed. Supp. 425 (E. D., Mo.);

Bradley v. *Halliburton Oil Well Cementing Co.,* 100 Fed. Supp. 913;

Hopson v. *North American Ins. Co.,* 233 Pac. (2d) 799.

PRAYER

Your petitioners respectfully submit that the *writ of certiorari* should issue to the Supreme Court of the State of Oklahoma in said cause, to the end that this Court may review said cause and same may be determined by this Court as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to the Court may seem appropriate and that the said judgment of the Supreme Court of Oklahoma be reversed by this Honorable Court.

HARRY S. CONNELLY and MARION E. CONNELLY, W. A. GRANT and ELAINE GRANT, a co-partnership doing business as Harbar Drilling Co.,
Petitioners, by

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE JUDGMENT

The opinion of the court below is reported in THE JOURNAL, published by Oklahoma Bar Association, Vol. 23, No. 6, dated February 16, 1952, page 235, but is not yet otherwise officially reported.

II. JURISDICTION

The jurisdiction of this Court is fully covered in the foregoing petition and statements there made are adopted here by reference.

III. STATEMENT OF CASE

A concise statement of the case is set forth in the foregoing petition under the heading "Summary and Statement of Matters Involved" and in the interest of brevity, is adopted here by reference.

The other facts relative to the dispute between petitioners and respondents related to common law liability of the petitioners to their employee, Alfred Jennings, to furnish a safe place for him to work, and matters arising under state law which do not pertain to the questions arising under federal law.

Briefly, these additional facts as stated by the Supreme Court of Oklahoma are that the deceased fell to his death because the stairway to the ground was too steep, had no handrail on the left descending, that peti-

tioners were not entitled to the defense of assumption of risk, use of the word "casual" for "causal" in two instructions was harmless, that the admission in evidence of rules, regulations and practices of the State Labor Department pertaining to stairways in factories did not prejudice petitioners, and that evidence adduced through certain hypothetical questions propounded to the doctors was not prejudicial. Petitioners challenged the sufficiency of the evidence to show any causal connection between the death of deceased and any condition of the stair or any act of alleged negligence and controverted the rules of law announced by the court.

SPECIFICATIONS OF ERROR

Under "Questions Presented" and "Jurisdiction", your petitioners have set forth the errors complained of and which they seek to have reviewed by this Court. Briefly, they are summarized herein as follows:

1. The Supreme Court of Oklahoma erred in holding that the May 24, 1949, amendment to Section 1446, Title 28 U. S. C. A. (c. 139, 63 Stat. 101), did not grant to petitioners the right of removal when first ascertained during the process of trial on the merits.

2. The trial court erred, and the Supreme Court by affirmance of that hold erred, in refusing to allow the petitioners a reasonable time to file petition for removal when the fact of removability was first ascertained during trial.

3. The court erred in refusing to find that the joinder of Prather was a sham, without any reasonable basis in

fact, and that such fraudulent joinder was first ascertained by petitioners at the close of respondents evidence.

4. The court erred in refusing to find that respondent voluntarily abandoned her cause against Prather at the close of her evidence, thereby creating a diversity of citizenship entitling petitioners to remove said cause immediately.

5. The court erred in attempting to determine the petitioners' right of removal, when the federal court for the western district of Oklahoma was the only court having jurisdiction to determine such question.

6. The court erred in depriving the petitioners of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

7. The court erred in refusing to find that under Sections 1441 and 1446 U. S. C. A. Title 28, as amended May 24, 1949, filing of second petition for removal in the federal court on June 27, 1949, divested the state court of jurisdiction to proceed further because no order to remand was ever issued or filed in the state court.

V. ARGUMENT AND AUTHORITIES

(Specification of Error 1)

The Judicial Code of June 25, 1948 (62 St. 939), provided by Section 1446, Title 28, Subdivision (b):

> "The petition for removal of a civil action or proceeding may be filed within 20 days after commencement of the action or service of process whichever is later."

By act of May 24, 1949, c. 139, 63 Stat. 101, this subdivision (b) was further amended and added the following paragraph:

> "If the case stated by the initial pleadings is not removable, a petition for removal may be filed within 20 days after receipt by the defendant through service or otherwise, of copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."

The Judicial Committee clearly explained the purpose of this amendment when the proposed act was presented to Congress. From U. S. Code Congressional Service, Vol. 4, 1949, page 644, we quote:

> "The second paragraph of amendment to Subsection (b) is intended to make clear that the right of removal may be exercised at a later stage of the case if the initial pleading does not state a removal case but its removability is subsequently disclosed. This is declaratory of the existing rules laid down by the decisions. See for example *Powers* v. *Chesapeake*, 169 U. S. 92."

An interesting history of removal statutes is found in the case of *Texas* v. *Felt*, 150 Fed. (2d) 227, 160 A. L. R. 931, which refers to the major removal statutes of 1866, 1875 and 1948 and some of the differences between them. Decisions relating to rights of removal and the time for such proceedings must be read in the light of the particular statute in force at the time involved.

While we have found no case from this Court construing this amendment of May 24, 1949, we call attention to the following cases from lower federal courts which

have held that this amendment was for the express purpose of granting the right of removal where removability is disclosed at any stage of the proceedings, even during process of trial. We refer to *Waldron* v. *Skelly Oil Co.*, 101 Fed. Supp. 425 (E. D., Mo.); *Bradley* v. *Halliburton Oil Well Cementing Co.*, 100 Fed. Supp. 913.

We therefore submit that even though removability be first ascertained during process of trial, the May 24, 1949, amendment above referred to, grants the non-resident defendant the right of removal upon discovery of the conditions warranting removal. For this reason, the opinion of the Supreme Court of Oklahoma holding to the contrary is error and should be reversed.

(Specifications of Error 2 and 5)

Under Title 28, Section 1446, U. S. C. A. as amended May 24, 1949, petition for removal is now required to be filed in the federal court, instead of in the state court. Subdivision (e) thereof reads:

> "Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such state court, which shall effect the removal and the state court shall proceed no further unless and until the case is remanded."

Section 1447 (c) of the Judicial Code provides that at any time before final judgment, when it appears that the case was removed improvidently and without jurisdiction, the district court shall remand. Then "A certified copy of the order of remand shall be mailed by its clerk

to the clerk of the state court. The state court may thereupon proceed with such case."

The May 24, 1949, amendment added Subdivision "d" as follows:

> "An order remanding the case to the state court from which it was removed is not reviewable on appeal or otherwise."

From these statutes it seems obvious that only the proper district court of the United States has jurisdiction to determine whether the cause shall be remanded and that upon compliance with the provisions of Subsection (e), Section 1446 above quoted, the state court became divested of any jurisdiction to proceed further.

Immediately upon ascertaining at the trial that Prather was fraudulently joined and that respondent had voluntarily abandoned her purported cause of action against him petitioners moved for time to file their petition in the only forum which could determine the question of removability — the United States District Court for the Western District of Oklahoma, which was overruled and exceptions saved (R. 221). Petitioners were thus compelled to present their evidence in defense and at the close of all the evidence, before submission of the case to the jury, petitioners individually and jointly renewed their motion for opportunity to remove this case and time in which to remove the case to the federal court (R. 240), all of which were denied and exceptions saved.

A well reasoned case analyzing the effect of the May 24, 1949, amendment upon the state court's jurisdiction is

that of *Hopson* v. *North American Insurance Co.*, 233 Pac. (2d) 799.

From the specific language of the statutes quoted as well as the analysis contained in these three cases, it seems obvious that the state court grievously erred when it usurped the powers of the federal court by assuming to deny petitioners' right to remove, by overruling petitioners' motions for leave to file their petition for removal in the only forum endowed by law with jurisdiction to determine that right, and by compelling petitioners to continue defense of said cause in the state court after diversity of citizenship and right to remove became ascertained. Because the State Supreme Court affirmed these gross errors, the judgment of the State Supreme Court should be reversed.

(Specifications of Error 3 and 4)

When petitioners filed their first petition to remove, Judge Broaddus in substance held that in the absence of proof of fraudulent joinder, respondent's petition stated a cause of action. At the trial, respondent's own evidence disclosed beyond doubt she could not at the time of filing her petition, have had any reason to believe she could maintain any liability against the resident defendant Prather.

Her own brother Cummings, a crew member on duty with deceased, helped her prepare her case and the day following the accident caused some photos to be taken (R. 136-138). Cummings himself said the toolpushers were the ones in authority for the company; that Prather gave no orders concerning the stairway (R. 132). Thus her own

brother in charge of helping prepare her case knew at all times that Prather had no duty or responsibility concerning the stairway or its condition, even if it were defectively or negligently maintained as charged. Not a witness even intimated that the job of drilling superintendent extended to the erection of a derrick or inspection of the stairway or the sufficiency or safety thereof. The other two witnesses who were queried concerning Prather admitted that the drillers and toolpushers had responsibility concerning the derrick and stairway (R. 104, 140 and 145).

As the joinder was a sham and fraudulent, that is without any reasonable basis in fact and without any purpose to prosecute the cause in good faith against the resident defendant, the joinder cannot defeat petitioners' right of removal when such sham is shown. *Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 92, 66 L. Ed. 144, 42 S. Ct. 35; *Wecker* v. *National Enameling & S. Co.*, 204 U. S. 176, 51 L. Ed. 430; *Chesapeake & Ohio R. Co.* v. *Cockrell*, 232 U. S. 146, 34 S. Ct. 278, 58 L. Ed. 544; *Pullman Co.* v. *Jenkins*, 305 U. S. 534, 59 S. Ct. 347, 83 L. Ed. 334; *Updike* v. *West*, 172 Fed. (2d) 663.

In *Polito* v. *Molasky* (C.C.A.), 123 Fed. (2d) 258, certiorari denied 86 L. Ed. 1204, the Court said:

> "It appearing also that plaintiff joined them as defendants through a mistake of fact which might by the exercise of diligence have been discovered, the joinder is so baseless that it was fraudulent as a matter of law."

The 1949 amendment to Section 1446, Title 28, clarified the right of removal when the diversity of citizenship did

not exist in the beginning but appeared during the process of the litigation.

This is not a case where respondent had some reasonable ground at the time of filing her action, to believe Prather violated a duty. However, the fraudulent joinder could not be shown to the court until the trial on the merits. Consequently the case first became removable during the trial in the state court. The trial court's refusal to recognize that right could not defeat petitioners' right of removal since they continued to except to the refusal and proceedings, and did not waive any rights. *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 42 L. Ed. 673.

In its opinion, the Oklahoma Supreme Court cited as authority *Lathrop, Shea & Henwood* v. *Interior Construction & Improvement Co.*, 215 U. S. 246, 54 L. Ed. 177, and *Beaver Dam Cranberry Co.* v. *Pennsylvania Railway Co.*, 125 N. J. L. 369, 15 Atl. (2d) 613. Both cases expressly recite that fraudulent joinder was not involved, which clearly distinguishes them from the case at bar.

In addition, respondent's failure to even file motion for new trial against Prather or prosecute any appeal from judgment in his favor, as well as the failure to aduce evidence again him, indicates a voluntary surrender of her alleged right of action even if she had one in the first place.

State court's refusal to recognize this sham joinder and its denial of petitioners' right of removal upon disclosure thereof and on account of respondent's voluntary abandonment of purported cause of action against Prather, substantially prejudiced petitioners' rights under the fed-

eral removal act, for which the judgment ought to be reversed.

(Specification of Error 6)

Faced with the state court's refusal to grant even a recess in which to file their petition for removal, petitioners were compelled to continue their defense, the jury rendering verdict against them for $50,000. Within the time allowed by law they were then compelled to perfect their appeal or be subject to execution for the judgment.

Even under prior Removal acts, the state court must accept as true the allegations of fact in petitioners for removal, leaving to the federal court the actual determination thereof. *Chesapeake* v. *Cockrell,* 232 U. S. 146, 34 S. Ct. 278, 58 L. Ed. 544. By providing in Section 1446 as amended May 24, 1949 that taking the procedural steps effects the removal of the cause, the Congress has definitely fixed the jurisdiction in the federal court to determine all questions with reference thereto. As soon as the evidence disclosed that respondent's joinder of Prather was a fraudulent device to prevent removal, the federal court then became the only forum lawfully entitled to decide the right of removal, promptly demanded by petitioners. Compelling petitioners to proceed in the wrong forum deprived them of their property without the due process of law provided by the Judicial Code above referred to, violating the Fifth Amendment to the Constitution of the United States, for which the judgment should be reversed.

(Specification of Error 7)

Within seven days after disclosure of the fraudulent joinder of Prather and respondent's abandonment of her purported cause of action against Prather, petitioners lodged their petition for removal in the district court of the western district of Oklahoma.

It is not open to controversy that if, after an order to remand such as was made on petitioners' first petition, it results from the subsequent pleadings or conduct of the parties to the cause, that the cause is removable, on the development of such situation, a second application to remove may be made and the right to do so because of changed aspect is not controlled by the previous order remanding the cause. See *Fritzlen* v. *Boatmens Bank,* 212 U. S. 364, 29 S. Ct. 366, 53 L. Ed. 551.

By providing in Section 1446, Title 28 of the Judicial Code, as amended May 24, 1949, c. 139, 63 Stat. 101, that taking the procedural steps therein prescribed "shall effect the removal and the state court shall proceed no further unless and until the case is remanded" *which provision is not found in the earlier Act,* Congress has thereby expressly effected the removal of the cause to the federal court irrespective of the ultimate determination of the question as to whether or not it is removable. The case is not thereafter in the state court for any purpose until and unless the cause is remanded; for that reason the state court is expressly prohibited from proceeding further until and unless it is so remanded.

Under the old act, the removal was never accomplished unless it was a cause removable; under the present act removal is accomplished in the federal court, even though it may be subsequently determined that it should be and is thereafter remanded.

For a clear analysis of the question see *Hopson* v. *North American Insurance Co.*, 71 Idaho 461, 233 Pac. (2d) 799.

No order to remand was ever filed or issued. The record shows receipt by the clerk of the state court of certified copy of the second petition for removal required by Sub. (e), Section 1446 as last amended (R. 16).

Section 1447, Sub. (c) prescribes the only method by which jurisdiction may be reinvested in the state court as follows:

> "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction the district court shall remand the case and may order the payment of all just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the state court. The state court may thereupon proceed with such case."

We submit that unless an order to remand be filed in the state court, the presence therein of the certified copy of petition for removal renders that court without jurisdiction and all its subsequent proceedings are void, regardless of what disposition may be made of the petition.

If a state court proceeds to judgment in a cause notwithstanding the non-residents' attempt to remove, its

ruling in retaining the case will be reviewable in this Court after final judgment and the right to remove is not waived by defending the action in the state court. *Missouri Pacific Railroad Co.* v. *Fitzgerald,* 160 U. S. 556, 40 L. Ed. 536, 16 S. Ct. 389; *Metropolitan Casualty Ins. Co.* v. *Stevens,* 312 U. S. 563, 85 L. Ed. 1045; *Employers Reinsurance Corp.* v. *Wyant,* 299 U. S. 374, 81 L. Ed. 289.

We earnestly submit that the state court was without jurisdiction to proceed further in the absence of the filing of a certified copy of order to remand therein as required by Sec. 1447, Title 28, above quoted, and that all such procedings are void, for which the judgment of the State Supreme Court should be reversed.

CONCLUSION

For the errors discussed above and presented herein, we submit the petitioners have been deprived of their property without due process of law guaranteed to them under the fifth amendment to the U. S. Constitution, and that the state court has decided federal questions of substance in a way contrary to the statutes of the United States and not in accord with applicable decisions of this Court, for which petitioners pray a review of the state court's judgment and upon such review, the reversal of

the judgment and decision of the Supreme Court of the State of Oklahoma, and such other relief as to which petitioners may be deemed entitled.

Respectfully submitted,

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AUGUST, 1952.

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IN THE

Supreme Court of the United States

No. 289

HARRY S. CONNELLY and MARION E. CONNELLY, W. A. GRANT and ELAINE GRANT, a co-partnership doing business as HARBAR DRILLING CO.,

Petitioners,

vs.

IRENE ETHEL JENNINGS,

Respondent.

AMENDED PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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Dated: February 24, 1953.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No. 289

HARRY S. CONNELLY and MARION E. CONNELLY, W. A. GRANT and ELAINE GRANT, a co-partnership doing business as HARBAR DRILLING CO.,

Petitioners,

VS.

IRENE ETHEL JENNINGS,

Respondent.

AMENDED PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioners, Harry S. Connelly and Marion E. Connelly, W. A. Grant and Elaine Grant, a co-partnership doing business as Harbar Drilling Company, pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oklahoma entered in the above-entitled case on February 12, 1952.

OPINIONS BELOW

The District Court of Oklahoma County rendered no opinion. The opinion of the Supreme Court of the State of Oklahoma (R. 35) is reported at 23 Okla. State Bar Journal 235.

JURISDICTION

The judgment of the Supreme Court of the State of Oklahoma was entered on February 12, 1952 (R. 35). A petition for rehearing filed on March 3, 1952 (R. 44) was denied on March 25, 1952 (R. 46). Application for leave to file a second petition for rehearing filed on March 29, 1952 (R. 46) was denied on December 16, 1952 (R. 51). The jurisdiction of this Court is invoked under 28 U. S. C. § 1257 (3).

The federal questions for which review is sought were first raised in the trial court by motion at the close of the plaintiff's case (R. 27), which motion was overruled (R. 28). This motion was renewed at the close of all the evidence and was again overruled (Unprinted R., p. 240). The questions were again raised in the trial court under paragraphs 11 and 13 of the motion for a new trial filed June 24, 1949 (R. 29), which motion was denied on July 26, 1949 (R. 31). The questions were raised in the Supreme Court of Oklahoma under paragraphs 10-14 and 26 of the Petition in Error filed on January 18, 1950 (R. 1), and passed upon by that Court in the last two paragraphs of its opinion filed February 12, 1952 (R. 35). Finally the questions were raised under the first point in the Petition for Rehearing filed in the Supreme Court of Oklahoma on March 3, 1952 (R. 44), which petition was denied on March 25, 1952 (R. 46).

QUESTIONS PRESENTED [1]

1. Is Section 1446 (b) of Title 28 U. S. C., as amended on May 24, 1949, which provides for the filing of a petition for removal within 20 days after "it may first be ascertained that the case is one which is or has become removable," applicable to a case in the process of being tried, or is it only applicable, as the Supreme Court of Oklahoma held, "to matters arising prior to trial"?

[1] If certiorari is granted, petitioners also intend to argue that the trial court erred in denying petitioners' motion, once grounds for removal appeared, to stay the proceedings in the trial court for a reasonable time within which they could file a petition for removal in the appropriate Federal court.

2. After a proper petition for removal has been timely filed with the appropriate federal court, may a State court proceed further with the case when it has not received a certified copy of the order of remand from the clerk of the federal court, as provided by Sections 1446 (e) and 1447 (c) of Title 28 U. S. C.?

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra*, at pp. 11-13.

STATEMENT

Respondent's husband, Alfred Jennings, an Oklahoma resident, was employed by petitioners as a derrick man on a drilling rig operated in Oklahoma. On the afternoon of July 25, 1948, while on the derrick floor, Jennings started toward a nine-step stairway descending to the ground, apparently on his way to a shale shaker some distance from the derrick. A few minutes later, he was found unconscious on the ground near the stairway. He died on the way to the hospital. No one saw him fall from any point nor observed what caused his death.

Respondent, on November 8, 1948, filed a petition in the District Court for Oklahoma County naming petitioners herein, at all times non-residents of Oklahoma, as defendants and joining as a defendant, Charles Prather, an Oklahoma citizen, alleged to be field agent of petitioners. The petition charged that defendants had failed to furnish a safe place for her husband to work, by reason of which he fell to his death (R. 10).

Petitioners promptly filed, on November 22, 1948, a timely petition for removal in the United States District Court for the Western District of Oklahoma, pursuant to Section 1446 of Title 28 United States Code, as enacted on June 25, 1948, claiming separable and independent cause of action and diversity of citizenship (R. 13). In sustaining respondent's motion to remand (R. 15), the United States

District Court found in part that two specific acts of negligence as against Prather were alleged which. if established by the evidence, would subject him to liability as a joint tortfeasor. The Court held these allegations controlling in determining the question of jurisdiction on a motion to remand in the absence of proof of fraudulent joinder (R. 17).

The case went to trial on the merits in the State court on June 20, 1949. At the trial respondent abandoned the alleged acts of negligence against Prather and confined her evidence to the condition of the stairway. Her witnesses affirmatively disclosed these conditions were not under Prather's control and that he had no duty concerning them. At the close of respondent's evidence in chief, the trial court sustained Prather's demurrer to the evidence against him (R. 26).

After the United States District Court had denied the petition for removal, but prior to the commencement of the trial in the State court, Congress on May 24, 1949, amended Section 1446 of Title 28 United States Code. As enacted on June 25, 1948, this provision had required a petition for removal to be filed "within twenty days after commencement of the action, or service of process, whichever is later"; the amended provision authorized the filing of a petition for removal within twenty days after it "may first be ascertained that the case is one which is or has become removable."

Accordingly, as soon as Prather's demurrer to the evidence was sustained, leaving only non-resident defendants in the case, petitioners moved the State court for a reasonable time in which to file their second petition for removal in the federal court, as authorized by the May 24, 1949 amendment to 28 U. S. C. § 1446, on the theory that Prather's joinder was fraudulent; that diversity of citizenship had always existed but had just then become ascertained (R. 27). The court overruled this motion, allowing exceptions (R. 28). At the close of all the evidence, petitioners renewed this motion which was again denied, excep-

tion allowed (Unprinted R., p. 240). While respondent took exception to the court's order sustaining Prather's demurrer, she filed no motion for new trial as required by the laws of Oklahoma, so that judgment became final insofar as it related to Prather.

Petitioners filed their motion for a new trial on June 24, 1949, within the three days provided by Oklahoma statute (R. 29).

On June 27, 1949, within six days after trial and within the requisite twenty days after removability became ascertainable, while their motion for a new trial was pending, petitioners filed in the United States District Court for the Western District of Oklahoma, their second petition for removal (R. 6), pursuant to 28 U. S. C. § 1446, as amended on May 24, 1949. This petition recited the proceedings on the first petition for removal, the action of the trial court in sustaining Prather's demurrer, the fact that respondent failed to present any evidence against Prather and failed to file motion for new trial against him, and that by reason of her voluntary acts, and the false joinder the cause had become removable and that diversity of citizenship had always existed; and petitioners referred to the court's refusal to grant recess or time to file their petition before verdict. Petitioners furnished proper bond (R. 22), and filed in the State court on June 27, 1949, the certificate of the Clerk of the United States District Court for the Western District of Oklahoma showing receipt of the petition for removal (R. 6, 23), and fully complied with the removal statutes.

While petitioners thereafter voluntarily dismissed their petition for removal without prejudice (R. 34), the District Court of Oklahoma County, without having received a certified copy of any order of remand or, indeed, a certified copy of the order dismissing the petition for removal from the Clerk of the Federal Court,[2] continued with the

[2] The motion for dismissal and the order dismissing the petition for removal (R. 34) appear in the record before this Court only by stipulation of counsel. They are not and never were a part of the record in the State court.

proceedings in contravention of Sections 1446 (e) and 1447 (c) of Title 28 U. S. C. It heard argument and overruled petitioners' motion for a new trial (R. 31), and it thereafter entered final judgment (R. 31). Petitioners accordingly continued their defense against the verdict and judgment and appealed to the Supreme Court of Oklahoma (R. 1).

The Supreme Court of Oklahoma expressly overruled petitioners' argument. It examined the amended Section 1446 (b) of Title 28 U. S. C., and held that the amendment of May 24, 1949 was not intended to affect a case that was in the process of being tried, but only applied to matters arising prior to trial (R. 43-44).

Petition for Rehearing was filed (R. 44), and denied (R. 46). Application for leave to file a second petition for rehearing (R. 46) was denied (R. 51). The Mandate was issued January 16, 1953, but has been stayed pending application for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. The purpose of the 1949 Amendment to Section 1446 (b) of Title 28 U. S. C. was obviously to authorize removal where removability—though not ascertainable from the initial pleading—becomes ascertainable thereafter.[3] "The statute clearly contemplates in plain and unambiguous language a change in circumstances which makes a case, nonremovable when filed, one which is now or has become removable." *Bradley* v. *Halliburton Oil Well Cementing Co.* (E. D. Okl., Sept. 27, 1951) 100 F. Supp. 913, 917. This, of course, is the situation in the instant case. Nevertheless, the Supreme Court of Oklahoma expressly held with respect to the 1949 Amendment to Section 1446(b):

[3] The Revisers' Notes (2 U. S. C. Cong. Service, 1949, P. 1268) explain the purpose of this amendment as follows:

> The second paragraph of the amendment to subsection (b) is intended to make clear that the right of removal may be exercised *at a later stage of the case if the initial pleading does not state a removal case but its removability is subsequently disclosed.* (Emphasis added.)

> We do not think this change was intended to affect a case that was in the process of being tried, but only applied to matters arising prior to trial. (R. 44).

No authority was cited for this statement.

We believe this to be an erroneous view of the law and consequently an improper decision of the issue in this case. Moreover, it presents an instance of a State court construing an important federal statute not heretofore interpreted by this Court. And to the extent that this Court's decisions under prior removal statutes are apposite to the new statute, the decision of the Supreme Court of Oklahoma is probably not in accord. Cf. e.g., *Powers* v. *Chesapeake & Ohio Ry. Co.*, 169 U. S. 92.

Furthermore, the opinion of the Oklahoma Supreme Court is in conflict with all the reported decisions we have been able to find on this point. Two United States District Courts have, to our knowledge, directly considered the question of whether Section 1446 (b), as amended, is applicable to a case in the process of being tried; and in each instance it was held to be applicable. *Waldron* v. *Skelly Oil Co.* (E. D. Mo., Nov. 26, 1951) 101 F. Supp. 425; *Hamilton* v. *Hayes Freight Lines Inc.* (E. D. Ky., Feb. 13, 1952) 102 F. Supp. 594.[4] See also *Bradley* v. *Halliburton Oil Well Cementing Co.* (E. D. Okl., Sept. 27, 1951), 100 F. Supp. 913. These district court decisions have not been reviewed by courts of appeals, and cannot be, since by Section 1447 (d) of Title 28 U. S. C., a district court's order of remand is not reviewable "on appeal or otherwise." Accordingly, the instant case presents a particularly appropriate opportunity to render a determinative construction of Section 1446 (b) and thereby dispel the confusion and resolve the conflict.

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[4] In both cases a motion to remand was sustained: in the former because defendant was held to have waived his right when he continued in the State court without taking immediate steps to remove; in the latter because removal was not sought in the requisite twenty days. In each of these cases the court necessarily found that the right to remove existed: in the *Skelly Oil* case during the plaintiff's opening statement, and in the *Hayes Freight Line* case after the completion of the trial.

That this is an issue of general applicability and broad public importance can hardly be gainsaid. It is only because the amendment to Section 1446 (b) is less than three years old that there are not more decided cases in the reports. As time goes on, more and more courts—state and federal—will be faced with the issue and there is no decision from this Court to which they may look for guidance. One cannot estimate the number of cases now pending in which this issue awaits resolution.

Finally, the problem of removability is fundamental to a judicial system in which State and federal courts have an overlapping jurisdiction. The "prompt, economical and sound administration of justice depends to a large degree upon definite and finally accepted principles governing . . . the respective jurisdictions of federal and state courts . . ." *American Fire & Casualty Co.* v. *Finn,* 341 U. S. 6, 8. It is only when there is a clear delineation of a litigant's right to remove his case from one to the other that the harmonious operation of these parallel judicial systems can be maintained.

2. Prior to the revision of the United States Judicial Code in 1948, the practice with respect to removal was in a state of confusion. Perhaps the most vexing problem was that which arose by virtue of the continuation of a removed case simultaneously in both the federal and state courts. The general rule in such instances was that proceedings in a State court subsequent to a petition for removal were void if the cause was removable and valid if the cause was not removable. *Metropolitan Casualty Insurance Co.* v. *Stephens,* 312 U. S. 563; see discussion and cases collected in *Moore's Commentary on the United States Judicial Code* (1949) pp. 266 et seq.

The revision of the Code in 1948, and the amendments of 1949, abolished this prior practice. A new procedure was established which provided that once a proper petition for removal was timely filed in the appropriate federal court, the removal was effected and the State court could

proceed "no further unless and until the case is remanded." 28 U. S. C. § 1446 (e). The remand was accomplished when "a certified copy of the order of remand shall be mailed by [the federal court] clerk to the clerk of the State court. The State court may thereupon proceed with [the] case." 28 U. S. C. § 1447 (c).

In the instant case a petition for removal was filed prior to the trial court's ruling on the motion for a new trial. Petitioners conformed in all respects to the requirements of the removal statutes and filed the necessary certification with the clerk of the State court reflecting that the petition for removal had been filed in the federal court. The State court, nevertheless, continued with the case in the face of the clear language of the removal statutes. Accordingly, if the removal statutes mean what they say, the trial court, in going forward with the case without having received an order of remand or a notice of the withdrawal of the petition for removal, proceeded without jurisdiction and all proceedings thereafter were void and of no effect.

We have been unable to find any decision of this Court or any other federal court construing the new removal statutes with respect to this issue. A recent decision of the Supreme Court of Idaho directly supports petitioners' view. *Hopson* v. *North American Insurance Co.*, (1949) 71 Idaho 461, 233 P. 2d 799.[5] The opinion of this Court in *Kalb* v. *Feuerstein*, 308 U. S. 433, construing an analogous provision in Section 75 of the Bankruptcy Act, also supports petitioners' view. See also Moore's *Commentary on the United States Judicial Code* (1949), p. 277.

Despite the relatively short existence of the new removal provisions, the seeds of dissension which prevailed under prior removal statutes are apparently already being sown.

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[5] "We hold that under 28 U. S. C. A. § 1446, a case is removed from the jurisdiction of the State court upon a compliance with the procedural steps therein set forth for all purposes until and unless it is subsequently remanded to such State court; that until and unless the case is remanded no valid proceedings can be taken in the State court at any time following the filing of such petition . . .; *furthermore, that any action so taken in the State court thereafter and prior to remanding the cause to such State court, will have no force or effect.*" (Emphasis added.) 71 Idaho at 466.

The very problems which the revisions sought to correct are arising again.

If the instant case is not considered by this Court and the State court proceedings subsequent to the filing of the petition are not vacated, this case will stand as an invitation for renewed confusion in removal practice.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: February 24, 1953.

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APPENDIX

TITLE 28 U. S. C.

§ 1441. *Actions removable generally*

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters not otherwise within its original jurisdiction.

§ 1446. *Procedure for removal* (as amended May 24, 1949)

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitled him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if

such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the Clerk of such State court.

§ 1447. *Procedure after removal generally*

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdic-

tion, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.

§ 1446. *Procedure for removal* (as enacted June 25, 1948 but prior to amendment on May 24, 1949)

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Upon the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further therein unless the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 289.

HARRY S. CONNELLY AND MARION E. CONNELLY, W. A. GRANT AND ELAINE GRANT, a co-partnership doing business as HARBAR DRILLING CO., *Petitioners*

v.

IRENE ETHEL JENNINGS, *Respondent.*

On Amended Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

BRIEF FOR IRENE ETHEL JENNINGS IN OPPOSITION

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March, 1953.

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On Amended Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma

---

BRIEF FOR IRENE ETHEL JENNINGS IN OPPOSITION

OPINIONS BELOW

The District Court of Oklahoma County rendered no opinion.

The opinion of the Supreme Court of the State of Oklahoma (R. 35-44) is reported at 23 Okla. State Bar Journal 235.

JURISDICTION

The judgment of the Supreme Court of the State of Oklahoma was entered on February 12, 1952 (R. 35). A petition for rehearing filed on March 3, 1952 (R. 44) was denied on March 25, 1952 (R. 46). Application for leave to file a second petition for rehearing filed on March 29, 1952 (R. 46) was denied on December 16, 1952 (R. 51). The jurisdiction of this Court is sought to be invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED[1]

Petitioners' question numbered 1 (Amended Pet., p. 2) —whether Section 1446 (b) of Title 28 U.S.C., as amended on May 24, 1949, which provides for the filing of a petition for removal within 20 days after "it may first be ascertained that the case is one which is or has become removable," is applicable to a case in the process of being tried, or is it only applicable to matters arising prior to trial— goes beyond the scope of the matters in issue in this case and was not properly put in issue before the Court below. See infra, pp. 21-23.

This question can be more pertinently phrased as follows:

1. Did the May 24, 1949 Amendment to Section 1446, Title 28, U.S.C. (C. 139, 63 Stat. 101) (See Appendix, infra, pp. 32-33) allowing defendants to remove a cause within twenty days after it may first be ascertained that the case has become removable, introduce a substantial change in the then existing laws on removal or was this

[1] Petitioners have served notice that if certiorari is granted, they also intend to argue that the trial court erred in denying petitioners' motion, once grounds for removal appeared, to stay the proceedings in the trial court for a reasonable time within which they could file a petition for removal in the appropriate Federal Court (Amended Pet., p. 2, f.-note 1) The record clearly shows that grounds for removal never appeared and that the trial court acted in accordance with law.

provision declaratory of the then existing rule laid down by the decisions?

Petitioners' question numbered 2 (Amended Pet., p. 3) —after a proper petition for removal has been timely filed with the appropriate federal court, may a state court proceed further with the case when it has not received a certified copy of the order of removal from the clerk of the federal court, as provided by Sections 1446 (e) and 1447 (c) of Title 28, U.S.C.?—was not properly put in issue before the court below or in this Court and, if it had, could be couched in more relevant terms as follows:

2. May an unsuccessful defendant in a state court who has petitioned a federal district court for removal, arguing that his cause did for the first time become removable during the course of the trial, and who then has voluntarily dismissed his petition for removal, four days after this voluntary dismissal argue his own motion for a new trial in the state trial court and present no objection to said proceeding in the trial court and not call attention to the trial court of the existence of the dismissal, and upon losing out in the trial court, later bring an appeal and after that a petition for rehearing to the Supreme Court of the State and not mention the fact of the absence of a certified copy of the order of remand in the trial court until he files an Application for Leave to File Second Petition for Rehearing, which he is denied and then complain successfully to this Court because the trial court proceeded further upon his own motion?

STATUTE INVOLVED

The pertinent statutory provisions are printed in the Appendix, infra, at pp. 32-35.

STATEMENT

A. Facts

The facts in this case are well brought out in the opinion of the Supreme Court of the State of Oklahoma (R. 35-44). Briefly, they are as follows:

Respondent's husband, Alfred Jennings, now deceased, was employed by petitioners on a drilling rig in Garvin County, Oklahoma. He went to work on his tour about three o'clock in the afternoon of July 25, 1948. About six o'clock he came down from the swivel board to the derrick floor, which was about seventy feet below. He assisted other members of his crew with a piece of machinery, then took a drink of water and talked briefly with another member of the crew. He was seen walking toward a nine-step stairway leading off the derrick floor to the ground. This stairway was used by Jennings to get to the shale-shaker where he performed certain of his duties. Approximately five minutes after he was seen walking toward this stairway he was found by a fellow-employee lying upon the ground east of the stairway face down, with blood running from his nose and mouth, and there was a scuffed place on his forehead. He died on the way to the hospital a short time after he was found.

The Supreme Court of Oklahoma specifically found: "The stairway in this case was constructed in such a way as to invite use, but was entirely too steep for ordinary use, and was built in such a way as not to reveal its imperfections without inspection. It was such an instrumentality that the employee could rely upon the employer to make it safe." (R. 37).

The same Court further found: "We are definitely of the opinion that this stairway, at the bottom of which the deceased was found, was defective. The top step was narrow and the riser did not conform to the others; there was only one hand rail, and the stairs were too steep. The steps by their construction invited the user to walk facing the stairway in ascending and with his back to it descending, but were so defective that it was easy for anyone to lose his footing or become overbalanced and tumble headlong down the stairs." (R. 38).

B. Sequence of Pertinent Proceedings

An understanding of the pertinent proceedings from the trial court to the Supreme Court of Oklahoma is imperative in this case and because the complete and proper order of these proceedings with their significant dates is not given in petitioners' statement, the correct sequence of these proceedings will be given at this point.

The case was filed by the petitioners in the District Court of the State of Oklahoma, November 8, 1948. (R. 10) On November 22, 1948, the petitioners filed petition for removal from the State Court to the United States District Court of Oklahoma, alleging that the action against petitioners and defendant, Charlie Prather, was separable and that Charlie Prather was named in the petition "for the sole purpose of attempting to deprive the Federal Court of jurisdiction, and to prevent the removal of this cause to the Federal Court." (R. 13-14) The Federal Court after joinder of issues found squarely against petitioners and remanded the case back to the State Court for trial. (R. 15).

The District Court of Oklahoma County, State of Oklahoma, rendered a verdict and judgment in favor of respondent for the sole and exclusive use and benefit of herself as the surviving spouse and for the benefit of Jessie Jennings, age eight, Donald Jennings, age six, Howard Jennings, age four, and Dwuane Jennings, age two, the surviving minor children of Alfred Jennings, deceased (R. 32, 10), on June 21, 1949, and petitioners filed their motion for a new trial on June 24, 1949 (R. 29). On June 27, 1949, within six days after trial and within three days after petitioners filed their motion for a new trial, and while this motion was pending, petitioners filed in the United States District Court for the Western District of Oklahoma, a petition for removal (R. 6), purporting to base this petition upon 28 U.S.C., Sec. 1446, as amended on May 24, 1949. (See Appendix, infra, p. 32). Petitioners filed in the State Court on June 27, 1949, the certificate of

the clerk of the United States District Court for the Western District of Oklahoma showing receipt of the petition for removal (R. 6).

In that petition for removal petitioners argued that respondent had voluntarily discontinued her action against the resident defendant and had voluntarily failed to file a motion for a new trial as against the resident defendant, Prather, during the trial held on June 20 and 21, 1949 (R. 8). For a refutation of this argument, see infra, pp. 7-12. Petitioners argued further for removal to the Federal District Court, as follows:

> "Whereupon said cause did for the first time become removable and in compliance therewith your petitioners have caused this petition to be filed." (R. 8, 9).

For a reason known only to petitioners, they voluntarily moved to dismiss their petition for removal without prejudice on July 19, 1949 (R. 34). The United States District Court for the Western District of Oklahoma granted petitioners' request and ordered the cause dismissed without prejudice and at the costs of petitioners on July 22, 1949 (R. 34).

In that petition for removal, petitioners had the opportunity to make a timely presentation of the question whether Section 1446 (b) of Title 28 U.S.C., as amended on May 24, 1949, which provides for the filing of a petition for removal within 20 days after "it may first be ascertained that the case is one which is or has become removable," was applicable to the facts and circumstances of petitioners' case at that time. That is the substance and the relevant scope of the first question presented by petitioners in their amended petition for certiorari (Amended Pet., 2). Petitioners did raise this question (R. 8, 9) and then voluntarily moved that their petition be dismissed without prejudice (R. 34)

Petitioners in that petition for removal argued that their cause did for the first time become removable on June 20

and 21, 1949 (R. 8, 9). They then voluntarily dismissed their petition for removal and to the present day they have not filed a new petition for removal. Certainly, they did not file such petition within 20 days, as provided by Section 1446 (b) of Title 28 U.S.C., as amended on May 24, 1949. See Appendix, infra, p. 33.

On July 26, 1949, four days after dismissal in the Federal District Court, at petitioners' request, of petitioners' petition for removal, petitioners argued their motion for a new trial in the District Court of Oklahoma County, State of Oklahoma, which motion was overruled (R. 31).

C. Correction of Errors in Petitioners' Statement

In petitioners' statement we find the following erroneous remarks:

> "At the trial respondent abandoned the alleged acts of negligence against Prather and confined her evidence to the condition of the stairway. Her witnesses affirmatively disclosed these conditions were not under Prather's control and that he had no duty concerning them." (Amended Pet., 4).

In the petition upon which this case was tried in the trial court, the following language is found:

> "That on the 25th day of July, 1948, Alfred Jennings, deceased, was working for and employed by the defendant co-partnership, under the supervision of the defendant, Charlie Prather, field agent for said co-partnership and at all times hereinabove and hereinafter set out was acting as the servant, agent and employee of the said co-partnership." (R. 10-11).

In all the allegations of negligence found in said petition, respondent alleged that the defendants in the trial court, including petitioners and Charlie Prather, were guilty of negligence in maintaining an unsafe place for deceased to work and in failing to provide proper hand rails, failing to build a proper stairway, and other acts of negligence. (R. 10-12).

In petitioners' response in the trial court, petitioner admitted "that part of the allegations contained in paragraph '2' [of respondent's petition in the trial court] relating to the employment of Alfred Jennings, and the supervisory capacity of Charles Prather." (R. 20-21).

For the refutation of petitioners' erroneous statement, referred to supra, respondent must draw the attention of this court to the following stipulation of the attorneys for petitioners and respondent:

> "It is further stipulated and agreed that any of the parties may refer in their briefs and argument to the record filed in the Supreme Court of the United States, including any part thereof which has not been printed. John Butler, Peyton Ford, Counsel for Petitioner; C. W. Schwoerke, Counsel for Respondent." (R. 53).

In the opening statement, made to the jury by the respondent on page 70 of the case-made (R. Unprinted), we find this statement:

> "When we prove that state of facts, Gentlemen of the Jury, and you hear the testimony of liability and damages and, the Superintendent, the General Superintendent, Mr. Prather, was upon this floor and saw the condition existing and did not correct or order it corrected * * *."

Respondent then put on the driller in charge of the well and drilling rig of petitioners at the time of the death of the said Alfred Jennings, one Joe Kirkpatrick, and on page 101 of the case-made (R. Unprinted) this evidence was deduced from this witness:

> Q. "Was anyone over you in authority?
> A. Yes, sir.
> Q. Name the first man over you?
> A. You mean, the top man?
> Q. No. Who was he. What do you call him? Was he a driller, or something else? The first man over you?

A. Tool pusher.

Q. How many tool pushers?

A. There were two tool pushers and the drilling superintendent.

Q. Now, was there a drilling superintendent?

A. Yes, sir.

Q. What was he in charge of?

A. Everything.

Q. He was the man in charge of everything?

A. Yes, sir.

Q. Was he your superior officer?

A. He was, he came around and gave me orders.

Q. Who was your drilling superintendent?

A. Mr. Prather.

Q. Did he, or not, come to this rig during the time you were drilling before Alfred was killed?

A. Yes, sir; he had been out there.

Q. Had he been where he could see that condition?

A. He had been on the derrick floor.

Q. He had been, you say, on the derrick floor?

A. Yes, sir.

Q. At the time Mr. Prather, the Superintendent, was on the derrick floor, tell the jury, how many hand rails there were on that stairway?

A. There was one.

Q. Tell the jury whether or not the stairway was put in, as it is there, here on the floor, when he was there?

A. Yes, sir. * * *

Q. When Mr. Prather was there, were you and your crew using that stairway?

A. Yes, sir."

Andrew Cummings, another witness called by the respondent, testified, on page 132 of the case-made (R. Unprinted), as follows:

Q. "Do you know Mr. Prather, General Superintendent?

A. Yes, sir.

Q. I will ask you to state whether or not Mr. Prather, general superintendent, was at this derrick, and on the derrick floor, or about the derrick floor, before the date of this death? Was he or not?

A. He was out there sometime when we were rigging up.

Q. Did you ever receive any directions, or direct orders, as a member of the crew, from Mr. Prather?

A. Well, I will answer that this way. Someone called up—calls up some little something to do and he might have me do it. Like—get a chain, but, as far as any big job, I think they give that to the driller and the driller has the rough neck—tells the rough neck what to do.

Q. Did you ever hear any orders given to put another hand rail on that stairway or not?

A. No, sir; if they had told me to put another hand rail on there we would have done so."

Another witness, W. W. Hayes, was put on the stand by the respondent and on pages 139 and 140 of the case-made (R. Unprinted) we find this testimony:

Q. "Do you know Mr. Prather?

A. Yes, sir.

Q. Who is he? That is, how is he connected with the Company?

A. Drilling superintendent.

Q. Was he drilling superintendent at the time Alfred Jennings was killed?

A. Yes, sir.

Q. I will ask you to state whether or not he had been such drilling superintendent for some time?

A. Yes, sir.

Q. Tell the jury whether or not Mr. Prather, the general superintendent, had been at this location while the stairway was in this position as shown on this model?

A. Yes, sir.

Q. Do you know whether or not he used the stairway in going up on top of the derrick floor?

A. I could not say that * * *."

And on page 148 (R. Unprinted) we find this testimony:

Q. "Was there any hand rail on the left side of that stairway going down, at the time Mr. Prather, the General Superintendent was out there? * * *

A. Well, at the time before there was not no hand rail on it.

Q. Tell the jury here, whether or not Mr. Prather, the General Superintendent, was out there at any time when Alfred Jennings was working on the job on that derrick?

A. Yes, sir."

See, also, Demurrer to Evidence and Ruling thereon (R. 26).

This evidence is set out here to show this Court that the respondent, plaintiff in the lower court, in putting Mr. Prather in this lawsuit as a defendant, had good, sincere, and honest reasons to contemplate and consider that he was a proper party defendant.

The evidence at the trial disclosed that the non-resident defendants in the trial court, Harry S. Connelly and Marion E. Connelly, W. A. Grant and Elaine Grant, constituted a co-partnership, having their place of residence and office in Wichita, Kansas. That the defendant, Charles Prather, was their top man in Oklahoma; had charge of all their drilling operations and was Field Superintendent in Oklahoma. This evidence is undisputed.

Therefore, it was a serious and sincere claim that was made by petitioner in the trial court that if the negligence alleged as causing the death of Alfred Jennings, roughneck on one of the defendant's drilling rigs, maintained, operated and under the final jurisdiction and control of Prather, was actionable, such negligence should carry over to the defendant, Prather. Certainly, such joinder was not fraudulent and the trial court properly overruled petitioners' motion for continuance to remove their case to a Federal Court based upon the theory of a fraudulent joinder. (R. 5; Amended Pet. 4).

Petitioners' Statement contains the following language:

"While respondent took exception to the court's order sustaining Prather's demurrer, she filed no

motion for new trial as required by the laws of Oklahoma, so that judgment became final insofar as it related to Prather."

Respondent respectfully submits that there are no laws of Oklahoma that require a party to an action to file a motion for new trial. A plaintiff to an action may act in good faith and persist in his conviction that he has proved his case against all defendants, but for any number of good reasons he may choose not to file an appeal if one defendant succeeds in convincing the court that a slight preponderance of evidence is in defendant's favor. One plausible reason in respondent's case could well have been to expedite the completion of the case and the receipt of a remedy for herself and her four minor children.

Petitioners do not cite one case, because they cannot do so, to the effect that because no motion for new trial was filed, following the verdict of the jury, that constituted an abandonment of respondent's cause of action, to justify removal at that time.

ARGUMENT

A. Summary

Section 1446 (b) of Title 28, U.S.C., as amended on May 24, 1949 (See Appendix, infra, p. 33), which provides for the filing of a petition for removal within 20 days after "it may first be ascertained that the case is one which is or has become removable", is a provision that is declaratory of the rule laid down by the decisions as they existed at the time of the passage of this amendment on May 24, 1949. (See Appendix, infra, p. 32). Under the rule laid down by the decisions then and now, petitioners' case was not removable. Therefore, the Supreme Court of the State of Oklahoma and the trial court correctly decided the case. However, petitioners have no standing to be heard on this point, because they had an ample opportunity to test their claim to a right of removal in the

United States District Court for the Western District of Oklahoma (R. 6). Petitioners voluntarily moved to dismiss their petition for removal (R. 34), which request was granted (R. 34). They have not filed a new petition for removal within the 20 days' limitation. Therefore, petitioners have waived whatever right they might have had in this respect and have no cause to complain to this Court. That disposes of petitioners' question 1 (Amended Pet., p. 2).

Petitioners have no standing to argue their question numbered 2 (Amended Pet., p. 3) because they did not argue it on appeal (R. 1-5) or in their petition for a rehearing (R. 44-46) before the State Supreme Court, which was denied (R. 46).

B. Amplification of Argument

1. First Question Presented

(a) The 1949 Amendment to 28 U.S.C. 1446 (b) Was Merely Declaratory of Existing Law, Except for the Time Limitation.

Section 1446 (b) of Title 28, U.S.C., as amended on May 24, 1949 (See Appendix, infra, p. 33) provides:

> "If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable."

This provision was added to Title 28, U.S.C. by the Act of May 24, 1949, through the enactment of H. R. 3762, 81st Congress (See 63 U.S. Stat., Vol. 63, Part I, 81st Cong. 1949, p. 89). This provision constituted the second paragraph of the amendment to subsection (b) of Section 1446 of Title 28 U.S.C., and it was contained in Section 83 of H. R. 3762, 81st Congress.

The Committee on the Judiciary of the House of Representatives of the United States reported to the House of Representatives House Report No. 352, March 30, 1949, to accompany H. R. 3762. In this report, Section 83 of H. R. 3762 is discussed and the following language, pertaining specifically to that part of Section 1446 (b) quoted above is found:

> "The second paragraph of the amendment to subsection (b) is intended to make clear that the right of removal may be exercised at a later stage of the case if the initial pleading does not state a removable case but its removability is subsequently disclosed. This is declaratory of the existing rule laid down by the decisions. (See for example, Powers v. Chesapeake etc., Ry. Co., 169 U.S. 92)". See House Report No. 352, 81st Cong., 1st Sess., pp. 1 and 14; U. S. Code Congressional Service, Volume 2, 81st Congress, 1st Session, 1949, pp. 1248, 1254 and 1268.

The only change in the law in that second paragraph was the 20 day limitation which is new and specific.

The first paragraph of Section 1446 (b) of Title 28, U.S.C. (See Appendix, infra, p. 33) made a major change in the law of removal which is fully discussed in the House Committee Report on H. R. 3762 (See U. S. Code Congressional Service, Volume 2, 81st Congress, 1st Session, 1949, page 1268).

The Committee on the Judiciary of the Senate of the United States reported to the Senate of the United States Senate Report No. 303, April 26, 1949, to accompany H. R. 3762. In that report we find this statement:

> "Section 83 of the bill as it passed the House makes a major change in the law concerning the removal of cases from State Courts to Federal Courts." (See Senate Report No. 303, 81st Congress, 1st Session, page 6; U. S. Code Congressional Service, Volume 2, 81st Congress, 1st Session, 1949, pages 1253, 1254). However, the report then goes on to discuss exclusively in this connection the first paragraph of Section 1446 (b) of Title 28, U.S.C.

This first paragraph of Section 1446 (b) is not germane to this case except that the distinction made in the remarks in the Congressional Committee reports on this paragraph and the second paragraph of Section 1446 (b), which is germane to this case, indicates the clear Congressional intent to make a major change in the law of removal in the case of the first paragraph and to make the second paragraph merely "declaratory of the existing rule laid down by the decisions."

House Report No. 352, March 30, 1949, to accompany H. R. 3762, referring to what is the present last paragraph of Section 1446 (b) of Title 28 U.S.C., stated:

> "This is declaratory of the existing rule laid down by the decisions. (See for example, Powers v. Chesapeake etc., Ry. Co., 169 U.S. 92)."

This latter case involved a voluntary discontinuance on the part of the plaintiff in the State Trial Court after remand. After the case had been remanded, and when it was called for trial in the state court, the plaintiff discontinued his action against all the individual defendants, leaving it an action between citizens of different states; and the case then for the first time became one in its nature removable. The single remaining defendant thereupon immediately filed a second petition for removal, which was denied by the state court, but was granted and an amendment thereof allowed by the Circuit Court of the United States.

The Supreme Court of the United States affirmed the action of the Circuit Court of the United States after ruling:

> "It was thus made to appear, upon the record of the state court, that the case could not have been removed before, and that it had now become in its nature removable by reason of the diverse citizenship of the parties. Such being the case, it was rightly removed by the second petition for removal into the Circuit Court of the United States; and this petition was

rightly permitted to be amended in that court." John T. Powers v. Chesapeake and Ohio Ry. Co., 169 U.S. 92, 102.

The reason for the May, 1949 Amendment to Section 1446 (b) of Title 28, U.S.C. (See Appendix, infra, p. 33) was to make clear that the Congress approved the rule as set out in the case of *John T. Powers* v. *Chesapeake and Ohio Ry. Co.*, 169 U.S. 92. In this case, the Supreme Court, as far back as 1898, in effect amended the removal statute by court rule to extend the time within which the defendant could file an application in the Federal Court to remove, to include, in addition to the answer day in the State Court, two additional exceptions (1) where a separate controversy existed and (2) where the plaintiff by his own action and voluntary conduct dismissed his cause of action as to the resident defendant before trial date, or during the trial. This May, 1949 Amendment (See Appendix, infra, p. 32) was adopted by Congress to include these two exceptions to the previous removal date as set out by statute, to include these two exceptions in the *Powers* case. At the time this May, 1949 Amendment (See Appendix infra, p. 32) was adopted, the rule of the *Powers* case was existing law.

It being established that the last paragraph of Section 1446 (b) of Title 28 U.S.C. (See Appendix, infra, p. 33) is merely declaratory of then and now existing law, there remains but to review the rule of the cases on removal.

(b) The Rule of the Cases in 1949 and Still Today.

The Supreme Court of the State of Oklahoma cited the leading pertinent cases on this point, as follows:

> "In their fifth proposition defendants urge that the trial court committed error when it refused to grant them a continuance in order to permit them to make application to the federal court to remove the case 'to that court after the demurrer to the evidence of the local defendant had [fols. 339-340] been sustained.

This question was determined adversely to the defendants' contention by the Supreme Court of the United States in Lathrop, Shea, & Henwood Company v. Interior Construction & Improvement Company, 215 U. S. 246, 54 L. Ed. 177. See also Beaver Dam Cranberry Co. v. Pennsylvania Ry. Co., 125 N.J.L. 369, 15 A. 2d 613." (R. 43).

In the case of *Lathrop, Shea & Henwood Company* v. *Interior Construction & Improvement Company*, 215 U. S. 246, the action against the resident defendant was dismissed, leaving only the non-resident defendant, but plaintiff in good faith insisted on the joint liability of all the defendants until the close of the trial in the State Court. Defendant then removed the case to the Circuit Court of the United States.

The Supreme Court of the United States distinguished this case from the case of *John T. Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92. It reversed the decision of the Circuit Court of the United States and remanded, with directions to grant the motion of plaintiff to remand the case to the Supreme Court of the State. The Supreme Court of the United States quoted in support of its action the following language from the case of *Whitcomb* v. *Smithson*, 175 U. S. 635, 637:

"Passing on motions to dismiss or affirm and answering the contention of the receivers that they acquired the right of removal as though they were the sole defendants, when the court directed a verdict in favor of the railway company, this court said by the Chief Justice: 'This might have been so if when the cause was called for trial in the state court, plaintiff had discontinued his action against the railway company [the resident defendant], and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all of the defendants. Powers v. Chesapeake & Ohio Railway Company, 169 U. S. 92. But that is not this case. The joint liability was insisted on here to the close of the trial, and the non-

liability of the railway company was ruled *in invitum.* . . . This was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable, and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them.'

The Whitcomb case and the Powers case are commented on and impliedly approved in Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131, 138. And again in Kansas City Suburban Belt Ry. Co. v. Herman, 187 U. S. 63; Fritzlen v. Boatmen's Bank, 212 U. S. 364, 372. See also Alabama Great Southern Ry. v. Thompson, 200 U. S. 206.'' Lathrop, Shea & Henwood Company v. Interior Construction & Improvement Company, 215 U. S. 246, 250, 251.

The cases cited by the Supreme Court of the State of Oklahoma (R. 43) are authority for the proposition, and they have not been overruled in any later cases, that when a local defendant is dismissed against the contention of the plaintiff, this does not then make the case removable by the non-resident defendant. To the same effect are *Kansas City Suburban Belt Railway Company* v. *Andrew Herman,* 47 L. Ed. 76, 79; *Whitcomb* v. *Smithson,* 175 U. S. 635, 638; *Moeller* v. *Southern Pac. Co. et al,* 211 Fed. 239.

Cudney v. *Midcontinent Airlines, Inc.,* 98 F. Supp. 403, decided June 13, 1951, was decided after Section 1446 (b) of Title 28, U.S.C., was amended on May 24, 1949. The Federal District Court applied the traditional rule:

> ''The general rule is that right of removal will be decided by the pleadings. See cases 28 U.S.C.A. Sec. 1441, page 206. If the complaint charged only a claim against a non-resident defendant we think the non-resident defendant had two courses open—either to move for a more definite charge as to acts of the resident defendant upon which liability was claimed, or to stand on the pleadings and its position that no claim was stated against the resident defendant and remove

within twenty days and try the issue presented by the pleadings before this Court. See subparagraph (b) Section 1446, Title 28 U.S.C.A. The defendant did neither.

By going to trial in the State Court and awaiting a chance to move for dismissal as to the resident defendant on the merits of the case, as made by plaintiff's proof, and being successful on the motion, over plaintiff's protest, the non-resident defendant did not thereby acquire a right of removal. American Car & Foundry Company v. Kettelhake, 236 U. S. 311, 35 S. Ct. 355, 59 L. Ed. 594; Lathrop, Shea & Henwood Company v. Interior Construction & Improvement Company, 215 U. S. 246, 30 S. Ct. 76, 54 L. Ed. 177; Henley v. Community Natural Gas Co., D. C. N. D. Tex. 24 F. 2d 252; Kincheloe v. Hopkins, D. C. N. D. Okl. 4 F. Supp. 196." Cudney v. Midcontinent Airlines, Inc., 98 F. Supp. 403, 405.

(c) Petitioners' Cases Are In Accord With Respondent's Contentions.

In fact, the cases cited in support of petitioners' Section 1 of Reasons for Granting the Writ (Amended Pet., 6) do not establish the existence of a contrary rule.

Bradley v. *Halliburton Oil Well Cementing Co.* (E.D. Okl., Sept. 27, 1951), 100 F. Supp. 913, is cited by petitioners. In this case the resident defendant had died, after the case was filed and before it came on for trial. The court held that where the resident defendant died after suit was filed and before the cause of action is revived against the resident defendant by administration proceedings and the joinder of the administrator, the case was properly remanded to the Federal Court. It comes under the same exception.

To make this case analogous, the defendant in the trial court, Prather, would have had to die before trial date and the case removed to the Federal Court, before the case was revived against Prather's administrator. The case is not in point. To the extent that it may be read to imply

that the 1949 Amendment to Title 28, U.S.C. made a fundamental change in the second paragraph of Section 1446 (b) (See infra, p. 33), it is not in accord with the House Report on H. R. 3762, as explained supra, p. 13.

Another case cited by petitioners, *Waldron* v. *Skelly Oil Co.* (E. D. Mo., Nov. 26, 1951), 101 F. Supp. 425, supports respondent's position. Action was commenced against two resident corporations and a non-resident corporation. The action was voluntarily dismissed as to the two resident corporations by the plaintiff. Of course, the action against the non-resident thereupon became one which was removable to the Federal Court. That was the law before the May, 1949 Amendment to Section 1446 (b) of Title 28, U.S.C. (See Appendix, infra, p. 33) and still is the law, as contended by respondent. The Court further held that the defendant later waived his right to remove by continuing in the State Court.

Petitioners cite another case, *Hamilton* v. *Hayes Freight Lines, Inc.* (E. D. Ky., Feb. 13, 1952), 102 F. Supp. 594, which does not take issue with respondent's contention that the May, 1949 Amendment to the second paragraph of Section 1446 (b) of Title 28 (See Appendix, infra, p. 33) was merely declaratory of existing law. That case simply holds that the defendant must file his removal within the 20 days provided in the statute.

Respondent agrees that the purpose of the 1949 Amendment to Section 1446 (b) of Title 28 U.S.C. was to make clear that removal could be made within 20 days where removability—though not ascertainable from the initial pleading—becomes ascertainable thereafter. However, whether it becomes ascertainable thereafter is to be determined by the existing rule laid down by the decisions, as that rule existed on May 24, 1949, when the Amendment (See Appendix, infra, p. 33) was adopted. The removability of the case is determined by "the existing rule laid down by the decisions" as of May 24, 1949, except for the 20 day time limitation which is new and specific.

Petitioners state that the Supreme Court of Oklahoma expressly held with respect to the 1949 Amendment to Section 1446 (b) (See Appendix, infra, p. 33):

> "We do not think this change was intended to affect a case that was in the process of being tried, but only applied to matters arising prior to trial. (R. 44)." (Amended Pet., 7).

However, the Supreme Court of Oklahoma, prior to making that remark, correctly stated the pertinent law and cited the ruling cases on the issues, showing that the court understood that the 1949 Amendment to the second paragraph of Section 1446 (b) of Title 28 U.S.C. (See Appendix, infra, p. 33) was merely declaratory of existing law. The cases which it cited pertained to cases in various stages of trial. (R. 43).

If the language of the State Supreme Court is too sweeping in this respect, because a few exceptions not relevant to petitioners' case existed which affected a case in the process of being tried, as explained above, this would still not call for a reversal in the absence of proof that petitioners' case fits within one of those exceptions in the rule laid down by the cases in existence in May, 1949, and such proof has not been and cannot be made.

(d) Waiver of Petitioners' Right to Challenge Trial Court Decision.

Finally, while the above considerations would be determinative of the first question raised by petitioners' as rephrased by respondent to fit the facts of this case (See supra, pp. 2 & 3), if petitioners were in a position to raise it, the fact is that petitioners have waived their right to challenge the decision of the District Court of Oklahoma County, State of Oklahoma rendered against them. That State Court rendered a verdict and judgment in favor of respondent (R. 32) on June 21, 1949. Petitioners filed their motion for a new trial on June 24, 1949 (R. 29). On

June 27, 1949, within six days after trial and within three days after petitioners filed their motion for a new trial, and while this motion was pending, petitioners filed in the United States District Court for the Western District of Oklahoma, a petition for removal (R. 6), purporting to base this petition upon 28 U.S.C., Sec. 1446, as amended on May 24, 1949 (See Appendix, infra, p. 32). Petitioners filed in the State Court on June 27, 1949, the certificate of the clerk of the United States District Court for the Western District of Oklahoma showing receipt of the petition for removal (R. 6).

In that petition for removal, petitioners argued that respondent had voluntarily discontinued her action against the resident defendant and had voluntarily failed to file a motion for a new trial as against the resident defendant, Prather, during the trial held on June 20 and 21, 1949 (R. 8). (For a refutation of this argument see supra, pp. 7-12). Petitioners argued further for removal to the Federal District Court, as follows:

> "Whereupon said cause did for the first time become removable and in compliance therewith your petitioners have caused this petition to be filed." (R. 8, 9).

Petitioners voluntarily moved to dismiss their petition for removal without prejudice on July 19, 1949 (R. 34). The United States District Court for the Western District of Oklahoma granted petitioners' request and ordered the cause dismissed without prejudice and at the costs of petitioners on July 22, 1949 (R. 34).

On July 26, 1949, four days after dismissal in the Federal District Court, at petitioners' request, of petitioners' petition for removal, petitioners argued their motion for a new trial in the District Court of Oklahoma County, State of Oklahoma, which motion was overruled (R. 31). The Court thereafter entered final judgment (R. 31). Petitioners appealed to the Supreme Court of Oklahoma (R. 1). The Supreme Court affirmed the judg-

ment of the trial court (R. 44). A petition for rehearing filed on March 3, 1952 (R. 44) was denied on March 25, 1952 (R. 46). Application for leave to file a second petition for rehearing filed on March 29, 1952 (R. 46) was denied on December 16, 1952 (R. 51).

Petitioners argue that their "cause did for the first time become removable" on or about June 20 and 21, 1949 (R. 8, 9). According to petitioners' own arguments, the Federal Court had exclusive jurisdiction to grant them a remedy (Amended Pet., 8, 9). Petitioners in the Appendix to their amended petition (R. 12) cite 1446 (b) of Title 28, U.S.C. (See Appendix, infra, p. 33) which states that a petition for removal under the circumstances of petitioners' case may be filed within 20 days. Petitioners filed within the 20 days, but then dismissed their petition voluntarily and have not filed their petition anew in the Federal Court since that time. The twenty days having elapsed, petitioners waived, abandoned, or lost their only opportunity under the statute to assert whatever right they might have had in this regard.

As stated by the Supreme Court of the United States in the case of *Northern Pacific Railroad Company* v. *Austin*, 135 U. S. 315, 318:

> "Nothing is better settled than that to enable us to take jurisdiction on the ground of the denial by a state court of a right claimed under a statute of the United States, the record must show that the right was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed. Spies v. Illinois, 123 U. S. 131; Chappell v. Bradshaw, 128 U. S. 132. As the defendant did not apply for the removal of the cause, the right now claimed under the statute was not denied by the District Court, nor by the Supreme Court in affirming the judgment."

2. Second Question Presented

(a) The Record Fails To Show That the Trial Court Proceeded Irregularly.

Petitioners state as section 2 of their reasons for granting the writ:

> "The revision of the Code in 1948, and the Amendments of 1949, abolished this prior practice. A new procedure was established which provided that once a proper petition for removal was timely filed in the appropriate federal court, the removal was effected and the state court could proceed 'no further unless and until the case is remanded.' 28 U.S.C., Section 1446 (e). The remand was acomplished when 'a certified copy of the order of remand shall be mailed by [the federal court] clerk to the clerk of the state court. The state court may thereupon proceed with [the case].' 28 U.S.C., Section 1447 (c).
>
> In the instant case a petition for removal was filed prior to the trial court's ruling on the motion for a new trial. Petitioners conformed in all respects to the requirements of the removal statutes and filed the necessary certification with the clerk of the state court reflecting that the petition for removal had been filed in the federal court. The state court, nevertheless, continued with the case in the face of the clear language of the removal statutes. Accordingly, if the removal statutes mean what they say, the trial court, in going forward with the case without having an order of remand or a notice of the withdrawal of the petition for removal, proceeded without jurisdiction and all proceedings thereafter were void and of no effect." (Amended Pet., 8, 9).

This statement falls far short of being a candid one. It is rather a candied one. Petitioners do not state that the District Court of Oklahoma County rendered a verdict and judgment against petitioners on June 21, 1949 (R. 32); that petitioners filed their motion for a new trial on June 24, 1949 (R. 29); that on June 27, 1949, while petitioners'

motion for a new trial was still pending, petitioners filed in the Federal District Court a petition for removal (R. 6); that petitioners filed in the state court on June 27, 1949, the certificate of the clerk of the Federal District Court (R. 6); that petitioners voluntarily moved to dismiss their petition for removal without prejudice on July 19, 1949 (R. 34); that the Federal Court granted petitioners' request and ordered the cause dismissed without prejudice on July 22, 1949 (R. 34); that on July 26, 1949, four days after dismissal in the Federal District Court, at petitioners' request, of petitioners' petition for removal, petitioners argued their motion for a new trial in the District Court of Oklahoma County. This places the whole matter in a revealing, new light.

Respondent objects to the consideration of petitioners' statement that "the trial court, in going forward with the case without having received an order of remand or a notice of the withdrawal of the petition for removal, proceeded without jurisdiction and all proceedings thereafter were void and of no effect." (R. 9).

Respondent objects to the consideration of petitioners' question 2, implying that the court in this case proceeded "further with the case when it has not received a certified copy of the order of remand from the clerk of the federal court." (R. 3).

Respondent objects to the consideration of petitioners' statement that "the District Court of Oklahoma County, without having received a certified copy of any order of remand or, indeed, a certified copy of the order dismissing the petition for removal from the clerk of the federal court, continued with the proceedings in contravention of Sections 1446 (e) and 1447 (c) of Title 28 U.S.C." (Amended Pet., 5, 6).

As far as the record of this court is concerned, these are absolutely gratuitous assumptions. The record shows there were no proceedings in the state court during the time the petitioners' petition for removal was pending in the federal court, namely between June 27, 1949, the date of

filing, and July 26, 1949, the date of order of dismissal. Furthermore, there is no claim made by petitioners that the Federal District Court Clerk had not mailed the certified copy of the order to the Clerk of the State Court. If that was done, then the State Court could proceed under 28 U.S.C. 1447 (c), (Appendix, infra, p. 34).

(b) Petitioners Failed to Assert This Claim in Their Appeal to the Supreme Court of the State or in Their Petition for a Rehearing.

Although petitioners appealed to the Supreme Court of Oklahoma (R. 1), there is not any reference in that appeal to the absence of a certificate in the state trial court (R. 1-5), and petitioners failed to assert that right on appeal. They also failed to assert that right in their Petition for Rehearing in the Supreme Court of Oklahoma (R. 44-46), which was denied (R. 46). The suggestion of the absence of such a certificate seems to come as an afterthought in petitioners' Application for Leave to File Second Petition for Rehearing (R. 47), which was denied (R. 51). Petitioners' failure to argue this point on appeal and in their petition for rehearing constituted reason enough for denying their claim in their Application for Leave to File Second Petition for Rehearing. Of course, this claim in petitioners' Application for Leave to File Second Petition for Rehearing is not valid evidence of the absence of such a certificate on file in the trial court at the time it considered petitioners' motion for a new trial. Accordingly, petitioners' arguments on their question 2 (R. 3) and petitioners' question 2 (R. 3) should not be considered by this court.

(c) Even if Petitioners Could Now Assert This Claim, the Rule of the Cases is Against Their Contentions.

Even if petitioners could assert this claim, it would be ruled out by the holding of this Court in the case of *Northern Pacific Railroad Company* v. *Austin*, 135 U.S. 315, 318, to the effect that:

> "Nothing is better settled than that to enable us to take jurisdiction on the ground of the denial by a state court of a right claimed under a statute of the United States, the record must show that the right was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed. *Spies* v. *Illinois*, 123 U.S. 131; *Chappell* v. *Bradshaw*, 128 U.S. 132. As the defendant did not apply for the removal of the cause, the right now claimed under the statute was not denied by the District Court, nor by the Supreme Court in affirming the judgment."

Section 1447 (c) of Title 28 U.S.C. (See Appendix, infra, p. 34) imposes upon the clerk of the District Court the duty of mailing to the clerk of the State Court a certified copy of the order of remand. It is axiomatic that, in the absence of proof that this was not done, it will be presumed that federal officials and state officials have performed their duty.

Furthermore, if petitioners had been able to assert this claim in this Court, they would have been placed in the awkward position of seeking a favorable answer to their question 2 (Amended Pet. 3), as rephrased to fit the facts of this case. This question would be:

May an unsuccessful defendant in a state court who has petitioned a federal district court for removal, arguing that his cause did for the first time become removable during the course of the trial, and who then has voluntarily dismissed his petition for removal, four days after this voluntary dismissal argue his own motion for a new trial in the state trial court and present no objection to said proceeding in the trial court and not call the attention of the trial court to the existence of the dismissal, and upon losing out in the trial court later bring an appeal, and after that a petition for rehearing to the Supreme Court of the State, and not mention the fact of the absence of a certified copy of the order of remand in the trial court until he files an Application for Leave to File Second Petition for Rehearing,

which he is denied and then complain successfully to this Court?

The question would then be raised as to whether he is in a position to complain when he, knowing of the dismissal of his petition for removal, never brought the fact of the absence of a certified copy of the order of dismissal to the attention of the trial court and induced the trial court to believe the petition was dismissed and everything was in order, because he is arguing his own motion for a new trial. Could he complain of his own wrongdoing or negligence? Could he thus remain silent and be placed in the enviable position of taking advantage of his silence if the decision were in his favor, but objecting, as petitioner did in this case, if the decision went against him?

These questions are pregnant with a monumental no. A search of the cases has failed to yield an answer to these questions as no pleader has been apparently so audacious in the past.

Furthermore, what could this Court do or the lower courts have done for petitioners except to allow them to go to the Federal Court, which privilege they exercised and then voluntarily abandoned?

In their Statement, petitioners made the following erroneous remarks:

> "At the trial respondent abandoned the alleged acts of negligence against Prather and confined her evidence to the condition of the stairway. Her witnesses affirmatively disclosed these conditions were not under Prather's control and that he had no duty concerning them." (R. 4)

These baseless charges have been refuted in respondent's statement (See infra, pp. 7-12).

If this Court, or the lower courts had heeded petitioners' pleas, they would simply have allowed them to do what they chose not to do, to present the question of a theoretical fraudulent joinder to a federal court. They did this early in the proceedings (R. 13) and the federal court sustained respondent's motion to remand (R. 15-16).

In this the Federal Court was backed by a solid wall of decisions to the effect that the non-resident defendant seeking removal of a case to the federal court has the burden of proving that the resident defendant was fraudulently joined to prevent removal. All the authorities hold that the alleged fraud of plaintiff in joining the resident defendant to prevent removal to the federal court must be proven by clear and convincing evidence. *Davis* v. *Standard Oil Co. of Indiana et al,* 47 Fed. 2d 48; *Smith* v. *Southern Pac. Co. et al,* 187 Fed. 2d 397; *Trivette* v. *Chesapeake & Ohio Ry. Co. et al,* 212 Fed. 641.

If petitioners had remained in the Federal Court, they would have had an opportunity to present the simple question of whether the trial court erred in denying petitioners' motion to stay the proceedings in the trial court in order that petitioners might file a petition for removal to a Federal Court. They would have had to prove that grounds for removal appeared. They could not have succeeded in view of the decisions discussed, supra.

For instance, in *Moeller* v. *Southern Pac. Co. et al,* 211 Fed. 239, there was an action in a state court brought by a citizen and resident of the state. A non-suit was granted at the close of plaintiff's preliminary case as to the resident defendants without plaintiff's consent. The plaintiff even refrained from opposing the motion for a non-suit, although he did not consent to it. The court stated:

> "Upon the facts, the case is not to be distinguished from that of *Whitcomb* v. *Smithson,* 175 U.S. 635, 20 Sup. Ct. 248, 44 L. Ed. 303, held not to be a removable cause.
>
> The facts do not bring the case within the principles of *Powers* v. *Chesapeake & Ohio Ry. Co.,* 169 U.S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. They do not disclose, as in that case, a voluntary discontinuance by the plaintiff as to the resident defendants. The fact that plaintiff refrained from opposing the motion for non-suit is not the equivalent of a voluntary dismissal by him as to the two defendants submitting the motion, since it may well be that previous rulings of the court during

the trial had made it impossible for plaintiff to make out a case as against those defendants. At to this, of course, the record here is silent. But, however, that may be, the record does disclose that plaintiff refused his consent that the two defendants be dismissed from the case, and, this being so, he cannot be regarded as voluntarily abandoning the right to have the case proceed upon the theory upon which it was begun. As said in Whitcomb v. Smithson with reference to the order granting the non-suit in that case:

> 'This was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable and thereby to enable the other dedendants to prevent the plaintiff from taking a verdict against them. The right to remove was not contingent on the aspect the case may have assumed on the facts developing on the merits of the issues tried.' '' *Moeller* v. *Southern Pac. Co. et al,* 211 Fed. 239, 240.

In view of the uniformity of the decisions upon the issue of removability at the time of the enactment of Section 1446 (b) of Title 28, U.S.C., as amended on May 24, 1949 (See Appendix, infra, p. 33), it is no wonder that petitioners voluntarily dismissed their petition for removal in the Federal Court (R. 34).

CONCLUSION

The decision is correct and presents neither a conflict of decisions nor any substantial question warranting review. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

TITLE 28 U. S. C.

Section 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim of right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or in its discretion, may remand all matters not otherwise within its original jurisdiction.

Section 1446. Procedure for removal (as amended May 24, 1949)

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitled him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within twenty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within twenty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within twenty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the Clerk of such State court.

Section 1447. Procedure after removal generally

(a) In any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise.

(b) It may require the petitioner to file with its clerk copies of all records and proceedings in such State court or may cause the same to be brought before it by writ of certiorari issued to such State court.

(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.

Section 1446. Procedure for removal (as enacted June 25, 1948 but prior to amendment on May 24, 1949)

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings, and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Upon the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further therein unless the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court.